United States Department of Labor
Employees' Compensation Appeals Board

D.D., Appellant	)	
and	)	**Docket No. 08-1960**
	)	**Issued: May 5, 2009**
DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, UT, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 7, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated June 12, 2008 in which an Office hearing representative affirmed the termination of his entitlement to wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office met its burden of proof in terminating appellant's entitlement to wage-loss compensation benefits for the period beginning November 2, 2007.

FACTUAL HISTORY

On July 18, 2005 appellant, then a 42-year-old nondestructive tester, filed a traumatic injury claim alleging that on June 11, 2005 he suffered pain in the right side of his buttocks and lower back when he slipped and fell while stepping off of a platform. He stopped work on July 11, 2005. The Office accepted the claim for displaced lumbar intervertebral disc and authorized an L5-S1 microdiscectomy, which appellant underwent on August 23, 2005. On

March 6, 2006 Dr. Blake G. Welling, a Board-certified neurosurgeon, released appellant from care and advised that he could return to unrestricted work. On March 13, 2006 Dr. Douglas Shepherd, a physiatrist, released appellant to work with no restrictions. He stated that appellant should work four hours a day gradually increasing the number of hours worked. On April 3, 2006 Dr. Shepherd noted that appellant was capable of working full duty. On April 24, 2006 he advised that appellant reached maximum medical improvement and could continue to work full duty.

In a consultation report of September 15, 2006, Dr. David J. Nathan, a neurosurgeon, noted that appellant had experienced significant midline low back pain and buttock pain for approximately one year. He advised that the pain was incapacitating, noting that appellant was unable to work and had been having issues with his employment as a result. In a September 15, 2006 return to work form, Dr. Nathan advised that appellant had low back and leg pain and weakness due to lumbar herniated disc, which required surgical intervention. He advised that appellant was to remain off work until February 2007.

In a letter dated September 27, 2006, the employing establishment issued a notice of proposed removal to appellant on the basis of unauthorized absence of more than 10 consecutive calendar days and disregard of directives. Appellant was provided 20 days to respond.

On October 17, 2006 appellant underwent a lumbar fusion and did not return to work. The Office authorized the surgery. It also paid continuing wage-loss compensation after his surgery.

By letter dated November 1, 2006, the employing establishment notified appellant that he was terminated from employment effective October 31, 2006. It noted that appellant did not reply to its September 27, 2006 removal proposal. The employing establishment found that both charges were supported by the evidence and warranted his removal. It also advised that either of the charges, when considered separately, would result in a decision to remove.

On May 29, 2007 Dr. Nathan released appellant to work with restrictions.

On July 16, 2007 the Office contacted the employing establishment advising that appellant was able to return to work with restrictions. It inquired regarding whether the employing establishment had employment available for appellant within his restrictions. On July 19, 2007 the employing establishment advised the Office that it was unable to offer appellant work as he was no longer an employee. The employing establishment submitted documents indicating that appellant had resigned his position in lieu of being removed.

In a September 5, 2007 report, Dr. Nathan advised that appellant reached maximum medical improvement. Appellant was released to work with permanent restrictions.

On September 18, 2007 the Office issued a notice of proposed denial of compensation for wage-loss benefits. It noted that appellant had been released to return to work on September 5, 2007. The Office also found that on November 1, 2006 he had been terminated for cause from the employing establishment and that there was no evidence that he was terminated because of the effects of his work injury. Appellant was afforded 30 days to submit evidence in support of his claim.

In an October 17, 2007 letter, appellant stated that he had been under physician's care for his work injury since July 11, 2005 and he was still under physician's care when he was terminated on October 31, 2006.

By decision dated November 2, 2007, the Office terminated appellant's entitlement to compensation for wage-loss benefits effective November 2, 2007 as he was terminated from his employment for cause.[1] It noted that appellant was paid temporary total disability for the work injury after the employing establishment terminated him as the medical evidence supported a continuing work-related total disability. The Office found, however, appellant was no longer entitled to continuing wage loss for temporary total disability as the medical evidence now supports that appellant is capable of returning to work. It further found that appellant was not able to return to work due to the fact he was terminated for cause and not because of his work injury.

On November 13, 2007 appellant, through his attorney, disagreed with the November 2, 2007 decision and requested a telephonic hearing. A telephonic hearing was held on February 12, 2008.

In a March 7, 2008 letter, the employing establishment advised that appellant had voluntarily resigned on October 31, 2006 in lieu of removal. A copy of the corrected standard Form 50 was attached.

By decision dated June 12, 2008, the Office hearing representative affirmed the Office's decision terminating entitlement to wage-loss compensation benefits on or after November 2, 2007. The hearing representative found that appellant's work stoppage on or after November 2, 2007, the date appellant's wage-loss compensation benefits were terminated, was not due to his physical inability to perform his assigned duties, but rather was a result of misconduct.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[2] Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[3] After it has determined that an employee has disability causally related to his federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[4]

[1] The Office advised that appellant's medical treatment benefits remained open for necessary treatment for his accepted condition and that the decision did not affect his entitlement to a schedule award for any established work-related permanent partial impairment.

[2] 5 U.S.C. § 8102(a).

[3] *Harold S. McGough*, 36 ECAB 332 (1984).

[4] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

The Board has held that when a claimant stops work for reasons other than his accepted employment injury, he has no disability within the meaning of the Act.[5]

ANALYSIS

The Office accepted that appellant sustained a displaced lumbar intervertebral disc on June 11, 2005 as a result of a slip and fall. The record reflects it authorized appellant's October 17, 2006 surgery and paid appropriate wage-loss compensation. This includes the period of time after appellant underwent his authorized surgery and was totally disabled. The evidence reflects that appellant was temporary totally disabled until Dr. Nathan released him to work with restrictions on May 29, 2007 and again on September 5, 2007.

The evidence further reflects that appellant was initially removed for cause from his job on October 31, 2006. Subsequently, the employing establishment modified this to reflect that appellant resigned in lieu of being removed. The Board has held that, when a claimant stops works for reasons unrelated to his accepted employment injury, he has no disability within the meaning of the Act.[6] In this case, the evidence supports that appellant's resignation on October 31, 2006 was precipitated by the employing establishment's impending termination for misconduct unrelated to his work injury. The employing establishment informed appellant that he was going to be terminated for cause. In its September 27, 2006 letter, the employing establishment notified appellant that it planned to remove him from employment on the basis of unauthorized absence of more than 10 consecutive calendar days and for disregard of directives. Appellant was given a chance to respond but he did not reply to the employing establishment's letter prior to his separation from the employing establishment. Accordingly, the evidence supports that appellant's resignation on October 31, 2006 was precipitated by the employing establishment's proposed removal due to unauthorized absences and disregard of directives. Thus, appellant's separation from his job on October 31, 2006 was due to reasons other than his accepted employment injury.

However, on October 17, 2006 appellant underwent authorized surgery, which rendered him totally disabled until May 29, 2007 when Dr. Nathan released him to return to work with restrictions. On September 5, 2007 Dr. Nathan again opined that appellant could return to work with restrictions. Thus, as appellant was totally disabled from October 17, 2006 until May 29, 2007, the Office properly paid him total disability compensation since residuals of his work injury precluded him from performing any type of work. After Dr. Nathan released appellant to restricted work on May 29, 2007, however, it was reasons other than his accepted employment injury that precluded him from returning to work. As appellant's employment injury was no longer the reason for him not working, the Office properly terminated his wage-loss benefits effective November 2, 2007. After he was provided notice of the proposed termination of compensation on September 18, 2007, he did not proffer any medical evidence that he remained totally disabled due to his accepted condition. The most current medical evidence before the

[5] *John W. Normand*, 39 ECAB 1378 (1988).

[6] *See Richard A. Neidert*, 57 ECAB 474 (2006). *See also John W. Normand, supra* note 5; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(1)(c) (May 1997).

Office at the time of its November 2, 2007 decision supported that appellant could return to work with restrictions.

While appellant asserts that he was still under medical care when he was terminated on October 31, 2006,[7] he has not alleged nor does the record establish that his resignation was precipitated for reasons other than misconduct. He did not submit any evidence to establish that his proposed termination was in error or withdrawn or that it was precipitated by his employment injury. The fact that appellant resigned on October 31, 2006 does not change the fact that the withdrawal of his position was premised on the misconduct. As the withdrawal of his position was premised on misconduct, he was not entitled to wage-loss compensation when his total disability ceased and he was released to return to work with restrictions.

As there is no evidence that appellant's inability to return to work was related to any continuing work injury, the Office met its burden of proof in terminating his wage-loss compensation effective November 2, 2007.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's wage-loss compensation on and after November 2, 2007.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' hearing representative's decision dated June 12, 2008 is affirmed.

Issued: May 5, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[7] It is noted that the Office paid temporary total disability until it terminated appellant's wage-loss compensation benefits effective November 2, 2007.